

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0230
Health Facility Quality Assessment Fee for 2003 - 2006**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Health Facility Quality Assessment Fee – Constitutionality

Authority:

IC § 6-8.1-5-1(b); PL 224-2003 § 70; PL 78-2004 § 27; PL 186-2005; PL 18-2006;
IND. CONST. art. I, § 19; IND. CONST. art. I, § 25; IND. CONST. art. III, § 1;
IND. CONST. art. IV, § 1; IC 4-22-2-19.1; IC 4-21.5-3-5; IC 6-8.1-5-1; IC 4-22-2.

Taxpayer protests the imposition, assessment, and collection of the Health Facility Quality Assessment Fee (HFQA), imposed by PL 186-2005, as a violation of the Indiana Constitution and the United States Constitution.

II. Health Facility Quality Assessment Fee—Review Procedures and Rulemaking

Authority:

IC 4-21.5-3-5; IC 6-8.1-5-1; IC 6-8.1-1-1; IC 6-8.1-3-1(a); 45 IAC 15 *et seq.*

Taxpayer protests the assessment of the Health Facility Quality Assessment Fee by the Department as invalid because the assessments did not contain an explanation of available review procedures and because the Department has not completed the rulemaking process.

STATEMENT OF FACTS

Taxpayer is licensed by the Indiana Department of Health as a 100-bed comprehensive care facility. It specializes in serving persons with Alzheimer's or other memory impairments. Currently, Taxpayer serves 80 such patients. The facility has been open for 8 years providing 24-hour support to its patients. Taxpayer does not obtain Medicaid reimbursement.

Senate Bill 169 was signed by the Governor on March 13, 2006 and was enrolled as PL 18-2006, effective July 1, 2006. PL 18-2006 is an extension of the Health Facility Quality Assessment Fee (HFQA), enacted in PL 186-2005. PL 18-2006 amended PL 186-2005, which was set to expire August 1, 2006. PL 18-2006 expires August 1, 2007. The history of the HFQA is:

Enacted in law: PL 224-2003 § 70

Amended by: PL 78-2004

Amended by: PL 186-2005

Amended by: PL 18-2006.

The substance of Taxpayer's protest is founded upon PL 186-2005. PL 186-2005 was enacted retroactively effective to July 1, 2003. The law creates a retroactive tax, called a "quality assessment" on certain "nursing facilities" and "health facilities." The responsibility for collection and enforcement of the tax is shared by the Department, which collects the tax from "health facilities," and the Office of Medicaid Planning and Policy, which collects the tax from "nursing facilities."

Taxpayer protests the imposition, assessment, and collection of HFQA on the basis of constitutional and administrative arguments. The Department scheduled and held a hearing. This letter of findings results.

I. Health Facility Quality Assessment Fee – Constitutionality

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b).

Much of the discussion is a compilation of information provided by Taxpayer and research conducted by the Department. The extended background provided in this letter of finding is included in order to illuminate the issues protested by Taxpayer. The information below outlines and summarizes the development of the Healthcare Quality Assessment Fee (HFQA), also referred to as the Quality Assessment Fee (QAF).

SYNOPSIS: PL 224-2003 § 70

Effective August 1, 2003, the Office of Medicaid Policy & Planning (OMPP) is required to collect a Quality Assessment Fee (QAF) from each nursing facility. A "nursing facility" is defined as a comprehensive care facility that is certified to participate in Medicaid. The QAF is to be collected from each facility that has a Medicaid utilization rate of at least 25 percent and has at least \$700,000 in annual Medicaid revenue. The money collected may only be used to pay the state's share of the costs for Medicaid services. The OMPP may not begin to collect the QAF until it calculates and begins paying enhanced reimbursement rates. If federal participation becomes unavailable to match the money collected from the QAF, the collection of the QAF is to cease. The OMPP is required to request and secure waivers from the United States Office of Health and Human Services, and after the approval of those waivers is to begin collecting the QAF. A nursing facility may not charge their residents the amount of the QAF the facility pays. The provision expires August 1, 2004. No rate for the QAF is stated.

PL 224-2003 § 70 is effective upon passage

SYNOPSIS: PL 78-2004 § 27

This amendment is enacted retroactive to July 1, 2003. It redefines "health facility" to mean a facility licensed as a comprehensive care facility. The definition of a "nursing facility" is amended, removing the requirement that it be a comprehensive care facility, requiring only that it be certified to participate in Medicaid. Provisions are inserted after the sub-section concerning 25 percent Medicaid participation and \$700,000 Medicaid annual revenue stating that if the United States Centers for Medicare and Medicaid (USCMM) does not approve payments under

the measure, the OMPP is to revise the waiver and resubmit it to the federal government. In amending the state's waiver plan, the OMPP is to collect the QAF—retroactively effective August 1, 2003—from each health facility except:

- a continuing care retirement community
- a health facility that only receives revenues from Medicare
- a health facility with less than \$750,000 in annual income
- The Indiana Veterans' Home

If USCMM does not approve payments under Indiana's methodology, the OMPP is to revise the waiver plan as soon as possible to be able to collect the QAF retroactively effective August 1, 2003. The OMPP may withdraw its waiver plan only if it determines that failure to withdraw will result in the spending of state money not funded by the QAF. This provision is amended to expire August 1, 2005 (changing it from August 1, 2004).

PL 78-2004 § 27 is retroactively effective July 1, 2003

SYNOPSIS: PL 186-2005

This amendment changes which Indiana agency collects the QAF, splitting it between the OMPP and the Department of Revenue (DOR). Effective retroactive to August 1, 2003, the OMPP is to collect the QAF from nursing facilities and the DOR is to collect the QAF from each health facility that is not a nursing facility. The exemptions enacted in PL 78-2004 § 27 remain intact. Effectively, the OMPP collects the QAF from Medicaid participation facilities, and the DOR collects the QAF from non-Medicaid participation facilities. The language is amended to read that the OMPP and the DOR will begin collecting the QAF once the federal government approves the waiver plan. Language is added to allow facilities to enter into installment agreements with the OMPP and the DOR to pay the QAF. Changes in language are made to reference the joint implementation of the QAF between the OMPP and the DOR. Joint rules are to be adopted. Other changes in language are inserted to reference nursing facilities and health facilities. The substantive provisions are not affected. New provisions are added to charge interest on the QAF if not paid within 10 days after the payment is due. New language is added to require the OMPP and the DOR to report to the Indiana State Department of Health (ISDH) those facilities with a 120 day delinquency in paying the QAF. Upon notification, the ISDH is to notify a delinquent facility that its license will be revoked if the QAF is not paid. If the facility fails to pay the QAF, the ISDH is to revoke the facility's license. New language is added that the OMPP is to report the following information to the Medicaid oversight commission at each meeting:

BEFORE APPROVAL OF THE QAF BY THE FEDERAL GOVERNMENT

- an update on the progress in receiving federal approval for the QAF and a summary of discussions with the federal government

AFTER APPROVAL OF THE QAF BY THE FEDERAL GOVERNMENT

- an update on the collection of the QAF
- a summary of the QAF owed by facilities
- other relevant information related to the implementation of the QAF

This provision is amended to expire August 1, 2006 (changing it from August 1, 2005). An emergency is declared for this act.

PL 186-2005 is effective upon the signature of the governor

SYNOPSIS: PL 18-2006

The only amendment is to change the expiration of the act from August 1, 2006, to August 1, 2007.

Taxpayer asserts that the Healthcare Facility Quality Assessment assessed against it may not be collected because it is unconstitutional under the Indiana Constitution and the United States Constitution.

Taxpayer's constitutional protests are:

1. The authority that the statutes give the administrative agencies to determine the amount of HFQA is an unlawful delegation of the power to tax under Article 1, Section 25; Article 3, Section 1; and Article 4, Section 1 of the Indiana Constitution.
2. Those provisions of the statute—contingent on decisions by a federal agency—violate Article 1, Section 25; Article 3, Section 1; and Article 4, Section 1 of the Indiana Constitution.
3. The bill enacting the HFQA was not confined to a single subject, in violation of Article 1, Section 19 of the Indiana Constitution, and subsequent amendments cannot correct this legislative error.
4. The retroactive application of the HFQA violates the Contract Clauses and Due Process Clauses of the federal and Indiana constitutions and violates IC 4-22-2-19.1.
5. The HFQA violates states and federal Equal Protection Principles.
6. The assessments do not comply with either IC 4-21.5-3-5 or IC 6-8.1-5-1 because they do not include an explanation of the available review procedures.
7. The assessments may not be collected because the Department has not completed its rulemaking process pursuant to IC 4-22-2.

The Department takes note of Taxpayer's constitutional and statutory protests. However, Taxpayer raises issues which are beyond the purview of administrative review by the Department. Taxpayer's constitutional challenges will not be addressed here because the Department will not overturn a tax scheme enacted by the Indiana General Assembly based upon Taxpayer's facial constitutional and statutory challenges.

FINDING

Taxpayer's protest is respectfully denied.

II. Health Facility Quality Assessment Fee—Review Procedures and Rulemaking

DISCUSSION

Taxpayer protests the assessment and collection of HFQA by the Department, stating:

1. The assessments do not comply with either IC 4-21.5-3-5 or IC 6-8.1-5-1 because they do not include an explanation of the available review procedures.
2. The assessments may not be collected because the Department has not completed its rulemaking process in IC 4-22-2.

HFQA is a listed tax, as defined in IC 6-8.1-1-1. The Department's primary responsibility under IC 6-8.1-3-1(a) is the "administration, collection, and enforcement of the listed taxes." Assessment of taxes, protests, and review procedures are stated in IC 6-8.1-5-1. A taxpayer seeking notice for administrative can look to IC 6-8.1-5-1 as the default statute. The Department in cooperation with FSSA is adopting joint rules. The proposed rules were issued in February 2006 and are scheduled for final adoption. While the joint rules regulating HFQA will modify the default procedures and timetable in IC 6-8.1-5-1, Taxpayer's standing to protest before the Department has been guaranteed by IC 6-8.1-5-1 until those rules are finally adopted. 45 IAC 15 *et seq* has been adopted by the Department and Taxpayer can rely on those rules until the specific HFQA rules are adopted. Additionally, Taxpayer was granted a hearing and this letter of findings is issued as a result of Taxpayer being able to rely on IC 6-8.1-5-1 and 45 IAC 15 *et seq*.

FINDING

Taxpayer's protest is respectfully denied.

AG/DK/BK – January 10, 2007